95-1405

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SANDRA LAMB,

Petitioner

v.

CITIBANK, N.A.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTION PRESENTED

In a Title VII employment discrimination case based on race, does the standard of proof on a motion for summary judgment, as explained in Saint Mary's Honor Ctr. v. Hicks, require plaintiff to establish the pretextual nature of defendant employer's non-discriminatory explanation by requiring that plaintiff prove both the falsity of the explanation and defendant's discriminatory intent?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
REFERENCE TO OPINIONS	1
STATEMENT OF JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	8
APPENDIX	10
COURT OF APPEALS ORDER AND OPINION	11
DISTRICT COURT OPINION AND ORDER	13
BRIEF FOR APPELLANT	23
BRIEF OF DEFENDANT-APPELLEE	29

TABLE OF AUTHORITIES

Cases	Page
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	5, 25
Montana v. First Federal Sav. and Loan Assoc. of Rochester, 869 F.2d 100 (2d Cir. 1989)	5, 24
Saint Mary's Honor Ctr. v. Hicks, ____ U.S. ____, 113 S.Ct. 2742 (1993)	5-9, 24-28
Saulpaugh v. Monroe Community Hosp., 4 F.3d 134 (2d Cir. 1993)	25-26
Sheerin v. New York State Div. of Substance Abuse Servs., 844 F.Supp. 909 (N.D.N.Y. 1994)	24
Strauss v. Microsoft Corp., 856 F.Supp. 821 (S.D.N.Y.1994)	26
Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)	5, 8, 25

Statutes	
42 U.S.C. § 2000e-2(a)	1, 2
28 U.S.C. § 1254	1
Article III § 2, Clause I of the United States Constitution	1
28 U.S.C. § 1331	2

REFERENCE TO OPINIONS

By order and opinion entered on September 11, 1995, the Hon. Ralph K. Winter, Hon. Frank X. Altimare, and Hon. Joseph M. McLaughlin, Circuit Judges of the United States Court of Appeals for the Second Circuit, affirmed the judgment of the District Court for the Southern District of New York (Michael B. Mukasey, J.) which, by order dated September 9 and entered on September 15, 1994, granted summary judgment for Respondent, Defendant Citibank, N.A., and dismissed Petitioner, Plaintiff Sandra Lamb's, complaint in its entirety, including, inter alia, Plaintiff's Title VII action for employment discrimination based on race.

STATEMENT OF JURISDICTION

Petitioner seeks a writ of certiorari to review the judgment of the Court of Appeals. Petitioner seeks to invoke the jurisdiction of this Court, pursuant to 28 U.S.C. § 1254, and Article III § 2, Clause 1 of the United States Constitution, on the grounds that the Court of Appeals, in affirming the decision of the District Court, decided a federal question of law in a way that conflicts with applicable decisions of this Court.

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a), provides:

> It shall be an unlawful employment practice for any employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion,

> sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Petitioner, Sandra Lamb ("Plaintiff"), filed this action on April 12, 1993, in the United States District Court for the Southern District of New York, against Respondent, Citibank, N.A. ("Defendant"), Plaintiff's former employer, alleging, inter alia, that Defendant discriminated against her on the basis of her race, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e.2(a) ("Title VII"), arising from Defendant's failure to retain or rehire her after a company reorganization occurring in late 1987. Plaintiff invoked the jurisdiction of the District Court pursuant to 28 U.S.C. § 1331.[1]

On March 4, 1994, Defendant filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56. The District Court (Michael B. Mukasey, J.), on September 9,

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1. Previously, on January 26, 1993, Plaintiff had obtained a Notice of Right to Sue from the Equal Employment Opportunity Commission (EEOC), authorizing Plaintiff to sue in federal court. In her action in the District Court, Plaintiff also filed a claim alleging violation of 42 U.S.C. §§ 1981 and 1983, and an additional claim alleging violation of New York State law, for intentional infliction of emotional distress, all arising from Defendant's same employment actions. None of those claims are the subject of the instant petition since Plaintiff did not appeal those claims in the Court of Appeals.

1994, granted Defendant's motion and dismissed, Plaintiff's complaint in its entirety, including Plaintiff's Title VII claim.

Plaintiff subsequently, on October 14, 1994, filed a notice of appeal in the United States Court of Appeals for the Second Circuit, pursuant to Fed. R. Civ. P. 4(a). In her appellate brief, Plaintiff appealed only that portion of the District Court's order granting summary judgment on her Title VII claim. After hearing argument on September 5, 1995, the Court of Appeals, on September 11, 1995, affirmed the District Court's decision.

FACTS

In 1979, Defendant ("the Bank"), hired Plaintiff to work in its Area Marketing Department, and in 1984, Defendant recruited Plaintiff into its Regional Marketing Department. In both departments, Plaintiff's duties involved marketing consumer banking products. In 1986, Defendant promoted Plaintiff to Assistant Vice President. In May, 1987, Defendant recruited Plaintiff into its Northeast Division Marketing Department (NED) where her duties involved marketing products to the Bank's more affluent customers.

In November, 1987, Defendant announced an upcoming restructuring which would consolidate the various marketing departments into a new department, Relationship and Product Development (R&PD). Defendant announced that officers not retained into the new department would be placed into an OutPlacement unit and would receive full salary until either being rehired elsewhere within the Bank or terminated. At the time, Plaintiff was working in the FOCUS Marketing Unit (FMU), a unit of the NED, where her duties involved marketing the "FOCUS" product which catered to the Bank's more affluent customers.

Plaintiff was the only African-American assistant vice-president out of the five officers in the FMU around the time of the reorganization. Two assistant vice-presidents

and the only manager were male Caucasians. The fourth assistant vice-president was a female Caucasian, Anne Marie Feisel. After the reorganization, Defendant retained one assistant vice-president and the manager, both males.[2] In January, 1988, Defendant simultaneously discontinued Plaintiff's and Ms. Feisel's positions and placed them both into Outplacement.

During Plaintiff's more than eight years with the Bank, Defendant had, on a yearly basis, given her official performance ratings and extensive written evaluations. In 1985 and 1986, Plaintiff received official ratings of "2/Outstanding" and "1/Exceptional", respectively, the highest ratings on a scale from 1 to 5. Around the time of reorganization in late 1987, Defendant completed a one-page Skills Assessment Inventory Form (SAIF) for its officers. In her SAIF, Plaintiff received a rating of "3/Good." In January, 1988, after Defendant discontinued her position and placed her into OutPlacement, Plaintiff received another rating of "3/Good" in a brief written evaluation.

At the time her position was discontinued, Ms. Feisel had been with the Bank for only nine months, compared to Plaintiff's eight-plus years. Defendant had transferred Ms. Feisel into the FMU just two months prior to the restructuring. During Ms. Feisel's nine-month tenure, she had never received an official performance rating or extensive written evaluation. However, in her SAIF, Ms. Feisel received an "estimated" rating of "2/Outstanding." In spring of 1988, after only a few months in OutPlacement, Defendant rehired Ms. Feisel elsewhere in the Bank.

Plaintiff, on the other hand, remained in Outplacement for eight months. During that time she interviewed for three positions within the Bank, but was

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2. Just prior to the reorganization, Defendant had terminated the other male Caucasian assistant vice-president.

not rehired. Plaintiff finally resigned in August, 1988.

PROCEEDINGS IN THE DISTRICT COURT

In response to Defendant's motion for summary judgment in the District Court, Plaintiff first established a prima facie case of discrimination. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-256(1981), McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); see also Montana v. First Federal Sav. and Loan Assoc. of Rochester, 869 F.2d 100 (2d Cir. 1989). Plaintiff established that "1) she is a member of a protected class; 2) she was qualified to assume another position; 3) she was discharged; 4) circumstances give rise to an inference of unlawful discrimination." See District Court Opinion ("Dist. Ct. Opn."), Appendix ("App.") at 18.

Defendant countered with a non-discriminatory explanation for its employment decisions, see Burdine, McDonnell Douglas, supra, stating that it retained the other officers and rehired Ms. Feisel because they were better qualified than Plaintiff. In support of its explanation, Defendant submitted the one-page SAIFs of the officers, affidavits from various personnel attesting to those officers' qualifications, and deposition and hearing testimony of Plaintiff.

Plaintiff then responded that Defendant's explanation that the other officers, including Ms. Feisel, were more qualified than her was pretextual. See Burdine, supra; see also Saint Mary's Honor Ctr. v. Hicks, ___ U.S. ___, 113 S. Ct. 2742 (1993). Towards establishing such pretext, Plaintiff submitted official Bank documents in which Defendant listed four specific criteria it allegedly used in determining which officers would be retained into the new department or rehired elsewhere in the Bank. Within the guidelines of the stated criteria, Plaintiff also submitted evidence documenting (1) her sixteen years of

prior marketing experience, (2) her 1985 and 1986 official ratings of overall performance, (3) her 1985 and 1986 written evaluations (totaling 25 pages) detailing her specific skills and competency levels and (4) her eight-plus years of service with the Bank. Plaintiff also pointed to the circumstances surrounding Ms. Feisel's short tenure, transfer into the FMU just prior to the reorganization, lack of official (versus "estimated") overall rating and written evaluation, and rapid rehire.

The District Court, deferring to Defendant's business judgment, totally discounted Plaintiff's documentary evidence and its own factual finding that the four stated criteria were relevant. The court stated:

> Plaintiff's past performance . . . was not directly relevant to her potential in the new . . . group. The only direct evidence the bank had to evaluate her performance . . . was the [SAIF] . . . that covered the brief period plaintiff worked within the FOCUS group.

Dist. Ct. Opn., App. at 20. The court also stated that Plaintiff "offers only her own opinion as to her superior qualifications . . ." Id. at 21. Throughout its opinion, the court made no reference to Ms. Feisel's rehiring. Ultimately, the court found that Plaintiff had not met her burden of establishing that Defendant's explanation was pretextual.

DISTRICT COURT'S INTERPRETATION OF HICKS

In finding that Plaintiff had not met her burden on summary judgment, the District Court relied on language from this Court's decision in Saint Mary's Honor Ctr. v. Hicks, ____ U.S. ____, 113 S.Ct. 2742 (1993). The court stated:

> Hicks increases the burden on plaintiff to show

> "both that the [employer's non-discriminatory] reason was false, and that discrimination was the real reason." Id. at 1252. [sic] ... Thus, after Hicks, if plaintiff cannot present a triable issue that Citibank's proffered reasons were false and that discrimination was the real reason behind its actions, then summary judgment should be granted.

Dist. Ct. Opn., App. at 20.

Applying its interpretation of Hicks to its factual findings, the court granted summary judgment on the Title VII claim, finding that Plaintiff "neither establishes that Citibank's reasons were false nor that she failed to receive a position because of racial discrimination." Id.

PROCEEDINGS IN THE COURT OF APPEALS

In her appellate brief in the Court of Appeals, Plaintiff argued that the District Court had misinterpreted and, consequently, misapplied the Hicks decision to the summary judgment process. Plaintiff argued that, in the first instance, the Hicks language relied on by the District Court was dicta and, further, that Hicks applied to a plaintiff's burden of proof at trial and, therefore, did not increase the burden of proof on summary judgment in Title VII cases. Plaintiff argued that, therefore, the District Court had effectively held plaintiff to an erroneous and higher standard of proof than required by law. See Brief for Appellant ("Appt. Br."), App. at 24-25.

In its brief, Defendant responded that the District Court had correctly interpreted and appropriately applied Hicks to the summary judgment process. See Brief of Defendant-Appellee ("Appe. Br."), App. at 31.

After hearing oral argument, the Court of Appeals did not address, in its one-paragraph decision, the Hicks argument proffered by Plaintiff. Rather, the court simply stated:

> After examining the record, we conclude that although plaintiff established a prima facie case of discrimination, she failed to offer any evidence that Citibank's proffered non-discriminatory reason for her termination was pretextual. (Citing Burdine, 450 U.S. 252-56.) We therefore affirm for substantially the reasons stated by the district court in its opinion and order dated September 9, 1994.

Court of Appeals Opn., App. at 11.

ARGUMENT

Petitioner ("Plaintiff") is asking this Court to review a matter of law, that is, the correct standard of proof on summary judgment in a Title VII employment discrimination case. Specifically, Petitioner seeks to have this Court clarify its Hicks language in light of what we argue is the District Court's misinterpretation and consequent misapplication of that decision to the instant case, and the Court of Appeals' decision which did not respond to the Hicks issue which Plaintiff raised on appeal. We believe that Petitioner is entitled to have her proffered arguments ruled upon, which argument, obviously, we -- and apparently the Court of Appeals also, in granting oral argument on the issue -- believe needs clarification.

We reasonably interpret the language used by the Court of Appeals, in "affirm[ing] for substantially the reasons stated by the district court in its opinion," as agreeing with the District Court's interpretation and application of Hicks. Thus, in spite of the fact that the Court of Appeals found that Plaintiff "failed to offer any evidence" of the pretext of Defendant's explanation -- a contention which we find incredible -- Petitioner is not asking this Court to rule on the evidence. On the other hand, however, since the District Court and, by implication, the Court of Appeals, analyzed the evidence

and made findings of fact in the context of its strong reliance on its own Hicks interpretation, then in the event that this Court finds that the court misinterpreted and misapplied Hicks to the evidence presented, such a finding would also open the door to the possibility that the both courts erroneously ruled that Plaintiff had not met her burden of establishing pretext. Therefore, we advance the same argument regarding Hicks as we did in the Court of Appeals. See Argument section in Appt. Br., App. at 24.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Pearl Street, in the City of New York, on the 11th day of September, one thousand nine hundred and ninety-five.

Present:

Honorable Ralph K. Winter,
Honorable Frank X. Altimari,
Honorable Joseph M. McLaughlin,
Circuit Judges.

SANDRA LAMB,
Plaintiff-Appellant,

v.

ORDER
94-9067

CITIBANK, N.A.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Filed September 11, 1995
George Lange III, Clerk
United States Court of Appeals
Second Circuit

Plaintiff Sandra Lamb appeals from Judge Mukasey's grant of summary judgment in favor of defendant Citibank. After examining the record, we conclude that although plaintiff established a prima facie case of discrimination, she failed to offer any evidence that Citibank's proffered non-discriminatory reason for her termination was pretextual. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981). We therefore affirm for substantially the reasons stated by the district court in its opinion and order dated September 9, 1994.

s/ Hon. Ralph K. Winter, U.S.C.J.

s/ Hon. Frank X. Altimari, U.S.C.J.

s/ Hon. Joseph N. McLaughlin, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in the unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SANDRA LAMB,

Plaintiff

93 Civ. 2358 (MBM)

-against-

OPINION AND ORDER

CITIBANK, N.A.,

Defendant

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MICHAEL B. MUKASEY, U.S.D.J.

Plaintiff Sandra Lamb alleges that her former employer, Citibank, N.A., discriminated against her on the basis of her race, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq (1982), 42 U.S.C. §§ 1981 and 1983. Plaintiff claims

also that Citibank's discriminatory termination inflicted severe emotional distress in violation of state law. Defendant moves for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons set forth below, that motion is granted and the complaint is dismissed.

I.

The following facts are not in dispute: Plaintiff is an African-American female who began working for defendant Citibank in September 1979 as an Area Marketing Manager. (Complt. 5,7) In May 1987, plaintiff was an Assistant Vice President earning approximately $45,000 when Citibank recruited her into its Affluent Marketing Group to assist in the Priority Services Program, which specialized in services and products for Citibank's more affluent customers. (Pl. 3(g) 30) Before the transfer, plaintiff had worked in a variety of positions that related principally to marketing banking products in Citibank's branches. (Pl. 3(g) 31)

In August 1987, Citibank suspended the Priority Services Program and transferred plaintiff to the FOCUS Marketing Unit, another subdivision of the Affluent Marketing Group. (Pl. 3(g) 38-39) The FOCUS product provided Citibank's wealthier customers with a cash management account, which combined consumer banking services, a line of credit, and discount brokerage products, including stocks, bonds, and other regulated securities not offered directly to regular customers. (Pl. 3(g) 43) Plaintiff's responsibilities within FOCUS were to create, develop, and execute a training program for the Regional Marketing Representatives and Customer Service Representatives. (Pl. Mem. at 2)

In January 1988, Citibank underwent a major consolidation and reorganization that included restructuring the various Northeast Division marketing departments along functional rather than geographic lines. (Pl. Mem. at 2) As part of this restructuring,

Citibank created a new centralized marketing group that included a smaller Affluent Segment Marketing Group with responsibility for the FOCUS product. (Pl. Men. at 2) Because this new marketing group was significantly smaller than the previous Northeast Division group, senior marketing management had fewer officer-level positions to fill. The four criteria used by senior management to select the new officers were: 1) specific skills and competency levels; 2) prior experience and achievements; 3) over-all performance evaluation/ contribution; and 4) length of service. (Pl. 3(g) 49) To aid in the selection process, the management officer of each candidate filled out a Skills Assessment Form that summarized the candidate's skills, experience, and other pertinent job-related information. (Pl. 3(g) 63)

Plaintiff, along with 27% of the officers formerly working within the Northeast Division, was denied a position in the new, streamlined unit. (Def. 3(g) 63) After plaintiff was unable to secure another position within Citibank, she resigned on August 25, 1988, and received full salary through March 7, 1989. (Def. Mem. at 2)

On August 17, 1988, plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") claiming that Citibank had discriminated against her on the basis of her race. (Ralph Aff.Exh. 1) In accordance with EEOC procedures, a copy of the charge was sent for initial action to the New York State Division of Human Rights ("SDHR"). On July 25, 1990, the SDHR determined that probable cause existed. (Ralph Aff. Exh. 1) Plaintiff, represented by counsel, then pursued her claim in the SDHR. In the administrative hearing that followed, plaintiff presented her testimony for two days, and then, after obtaining a "right-to-sue" letter, decided not to attend the continuation of the hearing. (Pl. Mem. at 6) Based on plaintiff's two-day testimony, the administrative judge issued an Opinion and Order on July 29, 1993 dismissing with prejudice plaintiff's complaint. The judge found that plaintiff "failed to establish a prima facie case of discrimination and had

abandoned her case." (Salvatore Aff. Exh. A) Plaintiff then commenced this action on April 6, 1993.

II.

In her complaint, plaintiff alleges that Citibank's decision to hire Steve Keitz, a white male, instead of her, "was based solely on racial grounds and cannot be justified on any business related pretext. (Complt. 13) In support of her allegation, plaintiff claims that she was the only black officer in the FOCUS Marketing Unit, and one of only two black officers in the Northeast Division marketing department with positions at the Assistant Vice-President level or higher. (Pl. Mem. at 29) Plaintiff alleges further that she had significantly more marketing experience and a better work record than both Steve Keitz, and David Pfau, another white male whom Citibank hired into the new group. (Pl. 3(g) 101-102) Plaintiff claims also that the officer responsible for her Skills Assessment Form was deeply disturbed over her own marital problems at that time and, consequently, the form did not accurately assess her performance. (Ralph Aff. Exh. 29 at 96, 99-100)

Plaintiff alleges two additional instances of discriminatory behavior: first, that the head of the Affluent Marketing Group advised other personnel at Citibank "not to rehire" plaintiff (Pl. Mem. at 42); second, that her immediate supervisor, whose husband is from India, at one time had compared her husband's skin color to plaintiff's skin color during a personal conversation. (Pl. 3(g) 107) Plaintiff admits, however, that the alleged statement by the head of the Affluent Marketing Group was "unsubstantiated rumor" (Salvatore Aff. Exh. H at 213-217), and that the supervisor's alleged comment was not interpreted by her at the time it was made as discriminatory. (Salvatore Aff. Exh. H at 147)

Defendant denies that its decision not to hire plaintiff was based on racial considerations, and argues instead

that it had legitimate, non-discriminatory reasons for its actions. Defendant asserts that plaintiff's Skills Assessment Form showed her performance was "good" but that her background in branch banking showed her skills were best utilized in the branch system as opposed to divisional marketing. (Reply Mem. at 16-18) Defendant asserts also that plaintiff admitted that she lacked "classical marketing skills," and that her greatest strength was in branch-related marketing. (Def. 3(g) 55, 57) Further, defendant claims that plaintiff had little knowledge of the securities business, and that such knowledge was necessary to market the FOCUS product. (Def. Mem. at 18)

Defendant further alleges that plaintiff had weaker credentials for working in the new department than did Steve Keitz: Keitz had an M.B.A., plaintiff had a high school diploma (Def. 3(g) 75-76); Keitz was a registered securities representative, plaintiff did not know the difference between a stock and a bond (Def. 3(g) 34, 75); Keitz had experience in FOCUS since May 1986, plaintiff had joined FOCUS in August 1987 (Def. 3(g) 75).

III.

* * *

Finally, defendant seeks a summary judgment dismissing plaintiff's Title VII claim on two grounds: that defendant has failed to present a prima facia case, and that she has not sufficiently challenged defendant's non-discriminatory reasons for its actions. Defendant's motion is granted for the reasons set forth below.

* * *

B. Title VII

Plaintiff's Title VII claim, although timely, cannot

survive defendant's summary judgment motion. The Supreme Court has outlined a three-step analysis for Title VII Claims. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-256 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); see also Meiri v. Dacon, 759 F.2d 989, 994 (2d Cir.), cert. denied, 474 U.S. 829 (1985). First, plaintiff must establish a prima facie case of discrimination. Second, if plaintiff does so, the burden then shifts to defendant to offer a legitimate, nondiscriminatory reason for its actions. Third, if defendant articulates such a reason, the burden shifts back to plaintiff to demonstrate that the employer's stated reason was a mere "pretext for discrimination." Burdine, 450 U.S. at 252-53.

1. Prima Facie Case

The Second circuit has refined the McDonnell Douglas test for determining whether plaintiff has established a prima facie case, 411 U.S. at 802, as applied to reduction-in-force cases. Montana v. First Fed. Sav. and Loan Ass'n., 869 F.2d 100 (2d Cir. 1989) (reworking test in age discrimination context). Under this formula, plaintiff must establish her prima facie case by demonstrating that: 1) she is a member of a protected class; 2) she was qualified to assume another position; 3) she was discharged; 4) circumstances give rise to an inference of unlawful discrimination. Brown v. Manufacturers Hanover Trust Co., 61 Fair Empl. Prac. Cas. (BNA) 1367, 1370 (S.D.N.Y. 1993); Walters v. Columbia Presbyterian Hosp., 53 Empl. Prac. Dec. (CCH) 39,870 at 62,220 (S.D.N.Y.), aff'd, 916 F.2d 709 (2d Cir. 1990).

Although the "burden of establishing a prima facie case is not onerous," Donaldson v. Merrill Lynch & Co., 794 F. Supp. 498, 503 (S.D.N.Y.1992) (citing Burdine, 450 U.S. at 253), plaintiff has barely met the minimum requirements.

2. Legitimate Rationale

Defendant has offered legitimate, nondiscriminatory reasons for its actions: a general reorganization and reduction in the size of the Affluent Marketing Group, and the hiring of officers with better qualifications for the job. Citibank proffers that the white officers brought into the new group had higher performance ratings than plaintiff, higher skill ratings, and longer service in Divisional Marketing. (Klinger Reply Aff. 3, 8-11) Citibank's business judgment should be given deference. The court should "refrain from intruding into an employer's policy apparatus or second-guessing a business's decision making process." Meiri, 759 F.2d at 995.

3. Pretext

Plaintiff may satisfy the burden of proving that defendant's stated reasons were merely pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing the employer's proffered explanation is unworthy of credence." Burdine 450 U.S. at 256; Meiri, 759 F.2d at 995. This familiar formula has been reexamined by the Supreme Court in Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993). Hicks increases the burden on plaintiff to show "both that the reason was false, and that discrimination was the real reason." Id. at 1252. [sic] Although Hicks was not a summary judgment case, courts have applied its teaching to the Burdine/McDonnell Douglas tests. See, e.g., LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 843 (1st Cir. 1993) ("plaintiff cannot avert summary judgment if the record is devoid of adequate direct or circumstantial evidence of discriminatory animus on the part of the employer"), cert. denied, 114 S. Ct. 1398 (1994); Card v. Hercules Inc., 5 F.3d 545, 1993 WL 351337, at *2 (10th Cir. Aug. 19, 1993) (plaintiff must, after Hicks, offer evidence that the

action was actually the result of unlawful discrimination); EEOC v. MCI Int'l Inc., 829 F. Supp. 1438, 1450 n.8 (D.N.J. 1993) (after Hicks, merely "showing that the defendant's proffered reasons is unworthy of credence . . . is no longer sufficient"); cf. Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 142 (2d Cir. 1993) (discussing Hick's fundamental change to the Burdine test), cert. denied, 114 S. Ct. 1189 (1994). Thus, after Hicks, if plaintiff cannot present a triable issue that Citibank's proffered reasons were false and that discrimination was the real reason behind its actions, then summary judgment should be granted.

Because plaintiff fails on both counts -- she neither establishes that Citibank's proffered reasons were false nor that she failed to receive a position because of racial discrimination -- summary judgment is granted on the Title VII claim. Both parties agree that as a result of Citibank's reorganization, a smaller marketing organization was created, that a Skills Assessment Form was used to determine who would be transferred into the new group, and that 27% of the officers from the old departments lost their jobs as a result of the new structure. Plaintiff's past performance in the branch or regional marketing levels was not directly relevant to her potential performance in the new FOCUS group. The only direct evidence the bank had to evaluate her performance within Divisional Marketing was the Skills Assessment Form filled out by her supervisor that covered the brief period plaintiff worked within the FOCUS group. Plaintiff's efforts to attack this evaluation as inaccurate or biased, based on her supervisor's alleged marital problems, are unconvincing, and, at any rate, fail to establish any connection at all with Citibank's alleged race discrimination.

Plaintiff's claim that similarly situated white employees within her unit were "chosen over her despite the fact that she had pristine qualifications" is also without support. (Pl. Mem. at 39) Plaintiff is unable to adduce any evidence that Citibank's assessments of the

white employees' qualifications were inaccurate, let alone racially motivated, and her own "good" ranking and the serious gap in her knowledge of the securities business leaves her claim of "pristine qualifications" without support in the record. To defeat summary judgment, plaintiff offers only her own opinion as to her superior qualifications for the job, and her insistence that race explains the outcome. That is simply not enough. See, e.g., Smith v. American Express Co., 853 F.2d 151, 154-55 (2d Cir. 1988) (summary judgment granted where plaintiff's allegations were "conclusory and unsupported by evidence of any weight"); Meiri, 759 F.2d at 998 (plaintiff cannot sustain burden "by offering purely conclusory allegations of discrimination"); Meloff v. New York Life Ins. Co., 92 Civ. 7126, 1993 WL 427423, at *3 (S.D.N.Y. Oct. 15, 1993) (mere allegations without proof are not evidence). Further, the fact that two white employees with comparable, and arguably superior records also failed to gain employment in the new group weakens further plaintiff's allegation of race discrimination. (Klinger Aff.5-6)

Plaintiff's claim that race discrimination also played a role in the bank's failure to place her in other positions relies as well on her unsupported opinion. Plaintiff's allegation that Creed Terry, the head of the Affluent Marketing Group, "put word out that [she] should not be rehired" (Pl. Mem. at 42) was based solely on unsubstantiated rumor (Salvatore Aff. Exh. H. at 215-17), and Terry himself states, in a sworn affidavit, that he had nothing at all to do with Plaintiff's job search. (Terry Aff.6) The fact that Citibank arranged three interviews for plaintiff, and placed another African-American officer who had been displaced by the reorganization into a position at the bank further undermines plaintiff's claim. (Klinger Reply Aff.13)

When an employer's "intent, motivation and state of mind" is in issue, "summary judgment should be used sparingly." Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988). However, even when all

evidence is examined in the light most favorable to plaintiff, as it must be on a motion for summary judgment, there are simply no material issues of fact in dispute that warrant a trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); Meiri, 759 F.2d at 997. Thus, defendant's motion for [sic] is granted, and plaintiff's action is dismissed pursuant to Fed. R. Civ. P. 56.

* * *

SO ORDERED:

Dated: New York, New York
September 9, 1994

s/ Michael B. Mukasey
U.S. District Judge

94-9067

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SANDRA LAMB,
Plaintiff-Appellant,

-against-

CITIBANK, N.A.,
Defendant-Appellee.

BRIEF FOR APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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* * *

ARGUMENT

* * *

III. THE DISTRICT COURT MISINTERPRETED HICKS TO REQUIRE PLAINTIFF, ON MOTION FOR SUMMARY JUDGMENT, TO PROVE DISCRIMINATORY INTENT AND THE FALSITY OF DEFENDANT'S NONDISCRIMINATORY EXPLANATION.

If, "where intent and state of mind are at issue . . . 'summary judgment is ordinarily inappropriate,'" Sheerin v. New York State Div. of Substance Abuse Servs., 844 F. Supp. 909, 910 (N.D.N.Y. 1994), citing Montana, supra at 103, then equally inappropriate is a standard of proof which rigidly requires a plaintiff to prove, in response to a motion for summary judgment, that an employer's stated reasons are false and that "discrimination was the real reason." [A-533], citing Saint Mary's Honor Ctr. v. Hicks, ____ U.S. ____, 113 S. Ct. 2742 (1993). In this case, the District Court imposed such a standard on Plaintiff after deferring to Defendant's business judgment and accepting, without inquiry, Defendant's supposed "legitimate, nondiscriminatory explanation for its actions." [A-532].

Hicks, as even the District Court noted, was not a summary judgment case; rather, Hicks addressed a Title VII plaintiff's standard of proof at trial. More importantly, Hicks did not, as the District Court so interpreted, "increase the burden on plaintiff to show 'both that the [employer's] reason [for its actions against the employee] was false, and that discrimination was the real reason.'" [A-533], citing Hicks, supra at 1252. Rather, the District Court took that sentence from the opinion out of context, since it amounted to no more that dicta from the majority in response to the dissent's reliance on dicta

from Burdine, supra [3], for the proposition that a directed verdict lies for a Title VII plaintiff who has established a prima facie case under the McDonnell Douglas standard and has proved only that the employer's nondiscriminatory reason is false. See Hicks, 113 S. Ct. at 2742. It was in this context that the Hicks majority responded that:

> [A] reason cannot be proved to be "a pretext for discrimination" unless it is shown both that the reason was false, and that discrimination was the real reason.

Id. As such, Hicks did not serve to increase any burden on a plaintiff; rather, it re-emphasized a holding that has existed all along: that "the Title VII plaintiff at all times bears the ultimate burden of persuasion." Id.

Likewise, cases after Hicks, contrary to the District Court's implication, [A-533, 534], did not serve to increase any burden on a Title VII plaintiff in either a trial or summary judgment context. See, e.g., Saulpaugh v. Monroe Community Hosp., 4 F3d. 134, 141 (2d Cir. 1993) (affirming liability after bench trial, for Title VII sexual harassment violation) ("We read Hicks as doing no more than reiterating the longstanding rule that despite shifting burdens of production, a plaintiff always

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3. The Hicks majority's exact wording was:

> The dissent is thus left with a position that has no support in the statute, no support in the reason of the matter, no support in any holding of this Court (that is not even contended), and support, if at all, only in the dicta of this Court's opinions.

113 S. Ct. at 2742

shoulders the ultimate burden of proof.")[4]

See also Strauss v. Microsoft Corp., 856 F. Supp. 821, 824 (S.D.N.Y. 1994), which cites Saulpaugh, supra. In Strauss, after Hicks was decided, the defendant renewed its pre-Hicks motion for summary judgment on the grounds that the plaintiff, who had claimed gender discrimination under Title VII for failure to be promoted, had not presented any evidence of intentional discrimination.[5] Denying the motion, the court stated:

> [T]he Hicks decision does not require that the Court make a finding of intentional discrimination based on evidence separate and apart from evidence that the defendant's proffered reasons are pretextual. Rather, under Hicks, a trial court may infer intentional discrimination from evidence that the defendant's proffered reasons are false. Thus, once a plaintiff establishes a prima facie case and raises a genuine issue of fact as to whether the defendant's reasons are pretextual, the ultimate finding of discrimination is a question for the factfinder.

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4. Note that in Saulpaugh, as in Hicks, this Court also focused on the scenario wherein "the failure of a defendant to meet its burden of production would result in a directed verdict for the plaintiff", Saulpaugh, 4 F.3d at 141, citing Burdine, supra, thus further emphasizing that the court was analyzing Hicks in the context of a plaintiff's burden of proof at trial.

5. Citing its pre-Hicks ruling for the same motion, the court found that the plaintiff "had satisfied her burden of proving by a preponderance of the evidence that [defendant's] proffered reasons [for not promoting her to technical editor] were merely pretextual and not the true reasons for the failure to promote." 856 F. Supp. at 832, citing Strauss v. Microsoft Corp., 814 F. Supp. 1186, 1191-94 (S.D.N.Y. 1993).

856 F. Supp. at 825 (emphasis added).

In the instant case, by incorrectly applying the Hicks dicta, the District Court required Plaintiff to prove (1) that Defendant's reason for not rehiring her, i.e., "the hiring of officers with better qualifications," was false and (2) that "she failed to receive a position because of racial discrimination." [A-532 through A-534].

Oddly enough, in arriving at the conclusion that Plaintiff failed to prove that the "hiring of officers with better qualifications" explanation was false, the court reasoned -- somewhat contrary to sound business judgment -- that an employee [Plaintiff], who has approximately eight-plus years experience in a specialized field [marketing consumer banking products] and who has recent performance ratings of "outstanding" and "exceptional" who is then recruited by her employer, as a result of her past experience and ratings into a specialized department [Northeast Division Marketing], is somehow divested of the right to point to those recent ratings and specialized experience when being compared to other competing employees. [A-534, 535].[6]

Applying the above narrow reasoning to find that Plaintiff's qualifications were merely "good", compared to those of the Caucasian employees who were retained into the new R&PD unit, the court effectively decided a material issue of fact against Plaintiff, despite the fact that Plaintiff had submitted evidence of recent performance evaluations supporting her own opinion as to her qualifications. [A-279 through A-300]. Only the

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6. The court stated: "Plaintiff's past performance in the branch or regional marketing levels was not directly relevant to her potential performance in the new FOCUS group. The only direct evidence the bank had to evaluate her performance within Divisional Marketing was the Skills Assessment Form filled out by her supervisor that covered the brief period plaintiff worked within the FOCUS group." [A-534, 535].

application of such narrow and unfair reasoning on the court's part could justify its statement that "plaintiff offers only her own opinion as to her superior qualifications for the job." [A-535].

Note again that the court, through its Hicks application, made no reference to the fact that the female Caucasian employee, Anne Marie Feisel, who had been placed into Outplacement with Plaintiff, was rehired. By contrast, the court's reference to the fact that Ms. Feisel "also failed to gain employment in the new group", [A-535, 536], obscures the fact that Plaintiff's claim was that she (Plaintiff) was not placed anywhere within the Bank, whereas Ms. Feisel was.

Thus, leaving aside the fact that it is Defendant's assertions -- and not Plaintiff's, as the court wrongly notes -- which are without support in the record, [A-535], see also n.8, supra, the above discussion demonstrates that in this case, numerous material issues of fact did exist which the court either did not address or, going beyond its role to determine whether such issues exist, made incorrect findings of fact in a light most unfavorable to Plaintiff.

* * *

Respectfully submitted,

s\ Keith Randall Ortega
610 623-8910

94-9067

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SANDRA LAMB,
Plaintiff-Appellant,

-against-

CITIBANK, N.A.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

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* * *

ARGUMENT

* * *

II.

THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFF FAILED TO ADDUCE ANY EVIDENCE THAT CITIBANK DISCRIMINATED AGAINST HER.

* * *

A. The District Court Applied the Correct Summary Judgment Standard.

As an initial matter, the District Court applied the correct and well-settled standard for summary judgment in a discrimination case. [Note omitted] Courts traditionally apply the three-stage burden of proof analysis articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) , and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). See, e.g., Spence v. Maryland Casualty Co., 995 F.2d 1147, 1155 (2d Cir. 1993). During the first stage, the plaintiff must establish, by preponderance of the evidence, a prima facie case of discrimination. See Zahorik v. Cornell Univ., 729 F.2d 85, 92 (2d Cir. 1984).

Once the plaintiff has established a prima facie case, the employer is required to offer a legitimate, nondiscriminatory reason for its actions. Maresco v. Evans Chemetics, Div. of W.R. Grace & Co., 964 F.2d 106, 110 (2d Cir. 1992). The plaintiff must then show that the reasons are pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing the employer's proffered explanation is unworthy of

credence." Burdine, 450 U.S. at 256.

In this case, Lamb contends that the Supreme Court's decision in St. Mary's Honor Ctr. v. Hicks, ___ U.S. ___, 113 S. Ct. 2742 (1993) should not apply to summary judgment proceedings, and that the District Court incorrectly interpreted Hicks. Plaintiff is clearly wrong, as the District Court's formulation is remarkably similar to this Court's recent articulation of Hicks in Woroski v. Nashua Corp., 31 F.3d 105, 110 (2d Cir. 1994):

District Court

"Thus, after Hicks, if a plaintiff cannot present a triable issue that Citibank's proffered reasons were false and that discrimination was the real reason behind its actions, then summary judgment should be granted." (A-534)

Woroski v. Nashua Corp.

"[A] plaintiff opposing such a motion [for summary judgment] must produce sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the employer were false, and that more likely than not the employee's [race] was the real reason for the discharge." (citing Hicks)

Accordingly, plaintiff's objection to the District Court's formulation of Hicks should be rejected without merit.

* * *

Respectfully submitted,

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May 5, 1995

(2)

Supreme Court, U.S.
FILED
APR 2 1996
CLERK

No. 95-1405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SANDRA LAMB,

Petitioner,

vs.

CITIBANK, N.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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19 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err when, in citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981) — and applying the three step analysis outlined there — it affirmed the District Court's grant of summary judgment based on a finding that Petitioner in this employment discrimination case had failed to offer *any* evidence that Respondent Citibank, N.A.'s proffered non-discriminatory reasons for her termination were pretextual?

PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Citibank, N.A. ("Citibank") is a wholly owned subsidiary of Citicorp. Citibank does not have any subsidiaries whose shares are publicly traded. The following are non-wholly owned Citibank subsidiaries:

Alarm Holdings, Inc.
American Italian Pasta Company
BPS Holding Corporation
Cable Systems Holding Company
Careercom Corporation
Chromcraft Revington
Citicorp Mezzanine Partners, L.P
Condere Corporation
Corral America Holdings, Inc.
Cort Business Services
Cuban American Nickel Company
Davco Food, Inc.
Delco Remy International, Inc.
Delta Commodities, Inc.
Electrocal Designs, Inc.
Fairmarkets, Inc.
FF Holdings Corporation
Frederick's Fine Chocolates, Inc.
FSI Holdings, Inc.
Galey & Lord Holdings
GCIH, Inc.
Glenoit Universal, Ltd.
GVC Holdings (c/o Ameripol Sympol)
Hancor, Inc.
Havco WP, Inc.
Haydon Corp.
HII Holdings, Inc.
Huntsville Television Holding Corp.
Hydrochem Holding, Inc.

International Airmotive Holding Corp.
International Media Group
Kraftube Management, Inc.
Marine Optical, Inc.
Milk Specialties Company
MM Holding Corp.
Mohawk Industries, Inc.
NAC Holding Inc.
One Sansome Street Associates
Palomar Technologies Corporation
Pinnacle Apparel Group
Plantronics Inc.
Polar Tank Holding, Inc.
PTI, Inc.
Rax Restaurants, Inc.
Res Associates of Georgia, Ltd.
Sansome Land Associates
Simmons Holding Corporation
Southern Coil Processing Inc.
Sterling Healthcare Corporation
Sybron Chemicals, Inc.
The Terraces L.C.
Triumph Group Holdings, Inc.
U.S. Air Shuttle, Inc.
Unisa Holdings Incorporated
Vectura Group, Inc.
WB Bottling Company
Westward Communications, Inc.
World Subordinated Debt Partners, L.P.
Zatarain's Brands, Inc.

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTION PRESENTED i

PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES ii

TABLE OF AUTHORITIES v

PRELIMINARY STATEMENT 1

COUNTERSTATEMENT OF THE CASE 2

COUNTERSTATEMENT OF THE FACTS 3

OPINIONS BELOW 5

ARGUMENT - REASONS WHY REVIEW IS NOT WARRANTED 7

I. Summary Judgment Was Appropriate Because Lamb Failed To Offer *Any* Evidence That Citibank's Reasons Were Pretextual. 7

II. Resolution Of Lamb's Purported "Legal Issue" Is Immaterial To This Case 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Bovers v. Flying Tiger Line Inc., 979 F.2d 291 (2d Cir. 1992) 8

Edwards v. Wallace Community College, 49 F.3d 1517 (11th Cir. 1995) 9

Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. 88 (1993) 8

Hiatt v. Union Pac. R.R., 65 F.3d 838 (10th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 917 (1996) 9

Hong v. Children's Memorial Hosp., 993 F.2d 1257 (7th Cir. 1993), *cert. denied*, ___ U.S. ____, 114 S. Ct. 1372 (1994) 9

Hughes v. Bedsole, 48 F.3d 1376 (4th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 190 (1995) 9

Hutson v. McDonnell Douglas Corp., 63 F.3d 771 (8th Cir. 1995) 9

Karpinski v. Billington, No. 93-5269, 1994 U.S. App. LEXIS 9961 (D.C. Cir. Jan. 27, 1994) 9

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 8, 11

Moore v. Eli Lilly & Co., 990 F.2d 812 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 467 (1993) 8

Mundy v. Household Finance Corp., 885 F.2d 542 (9th Cir. 1989) 9

Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796 (6th Cir. 1994) 9

Saint Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). 1, 7, 10 11, 12

Smith v. Stratus Computer, 40 F.3d 11 (1st Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1958 (1995) 8

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) . . . . . i, 1, 5, 7 8, 10, 11

STATUTES

42 U.S.C. §§ 1981 and 1983 2

PRELIMINARY STATEMENT

In this race discrimination action under Title VII of the Civil Rights Act of 1964 ("Title VII"), Petitioner Sandra Lamb ("Lamb") failed to offer *any* evidence that Citibank, N.A.'s ("Citibank" or the "Bank") reasons for her employment termination were pretextual. It is well-settled — by decisions of this Court and all twelve Courts of Appeals — that the employer must prevail under Title VII if the plaintiff fails to offer any evidence that the employer's proffered legitimate, non-discriminatory reasons are pretextual. On this basis, the United States Court of Appeals for the Second Circuit affirmed the District Court's grant of summary judgment for Citibank.

As is obvious from her petition, Lamb quarrels with the lower courts' determinations regarding her total lack of pretext evidence and her failure to raise a genuine issue of material fact with respect to Citibank's legitimate non-discriminatory reasons for her termination. But apparently recognizing that this Court rarely grants petitions for certiorari when the asserted error concerns the lower courts' evaluation of such record evidence, Lamb has concocted a "legal issue" in a transparent attempt to obtain certiorari. Lamb's so-called "legal issue," however, was irrelevant to the disposition of this case and therefore provides no basis for review by this Court.

Lamb "seeks to have this Court clarify its . . . language" in *Saint Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). (Petition ("Pet.") 8) This request is specious, as the Court of Appeals did not mention or rely upon *Hicks* in its one paragraph decision. Rather, both the Court of Appeals and the District Court applied the well-established three step *Burdine* analysis. As Lamb failed to present *any* evidence that Citibank's proffered reasons for her termination were false, there is no need here — just as there was no need before the Court of Appeals — to reach the issue addressed in *Hicks*. Lamb's petition therefore should be denied.

COUNTERSTATEMENT OF THE CASE

Lamb commenced this action against Citibank on or about April 6, 1993 in the United States District Court for the Southern District of New York.[1] She alleged that Citibank discriminated against her on the basis of her race, in violation of Title VII, when it terminated her employment as part of a reorganization. Lamb further alleged that Citibank had violated 42 U.S.C. §§ 1981 and 1983, and that Citibank had inflicted emotional distress upon her as a result of her termination.

The parties had a full opportunity to conduct discovery, and Lamb served discovery requests and deposed several Citibank employees. At the conclusion of discovery, Citibank moved for summary judgment. The parties extensively briefed the issues raised in the summary judgment motion.

By Order dated September 9, 1994, Judge Michael B. Mukasey granted Citibank's Motion for Summary Judgment, and dismissed the complaint in its entirety.

On or about October 14, 1994, Lamb filed a notice of appeal in the United States Court of Appeals for the Second Circuit. Lamb appealed only that portion of the District Court's order granting summary judgment on her Title VII claim.

The Court of Appeals heard argument on September 5, 1995. On September 11, 1995, the Court of Appeals issued a unanimous three sentence opinion. After reviewing the record

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[1] Prior to commencing this action, Lamb filed a charge of discrimination with the Equal Employment Opportunity Commission and the New York State Division of Human Rights ("SDHR"). Following two days of Lamb's testimony before the SDHR, the administrative judge issued an opinion and order dismissing her complaint with prejudice, finding that Lamb "failed to establish a *prima facie* case of discrimination and had abandoned her case." (Pet. 15-16)

in the District Court, the Court of Appeals found that Lamb "failed to offer any evidence that Citibank's proffered non-discriminatory reason for her termination was pretextual," and therefore affirmed the District Court's grant of summary judgment. (Pet. 12)

COUNTERSTATEMENT OF THE FACTS[2]

Lamb is an African-American woman who began working for Citibank in September 1977[3] as an Area Marketing Manager. In May 1987, Lamb was an Assistant Vice President, when Citibank placed her into its Affluent Marketing Group to assist in the Priority Services Program, which specialized in services and products for Citibank's more affluent customers. Before the transfer, Lamb had worked in a variety of positions that related principally to marketing banking products in Citibank's branches.

In August 1987, Citibank suspended the Priority Services Program and transferred Lamb to the FOCUS Marketing Unit, another division of the Affluent Marketing Group. The FOCUS product provided Citibank's wealthier customers with a cash management account, which combined consumer banking services, a line of credit and discount brokerage products, including stocks, bonds, and other regulated securities not offered directly to regular customers. Lamb's responsibilities within FOCUS were to create, develop, and execute a training program for the Regional Marketing Representatives and Customer Service Representatives.

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[2] These facts are taken from the District Court's decision, which was based upon the undisputed record evidence. (District Court Opinion, Pet. 14-22)

[3] In an apparent typographical error, the District Court stated that Lamb commenced her employment in 1979. (Pet. 14)

In January 1988, Citibank underwent a major consolidation and reorganization that included restructuring the various Northeast Division marketing departments along functional rather than geographic lines. As part of this restructuring, Citibank created a new centralized marketing group that included a smaller Affluent Segment Marketing Group with responsibility for the FOCUS product. Because this new marketing group was significantly smaller than the previous Northeast Division group, senior marketing management had fewer officer-level positions available in the new organization. The four criteria used by senior management to select the new officers were: 1) specific skills and competency levels; 2) prior experience and achievements; 3) over-all performance evaluation/contribution; and 4) length of service. To aid in the selection process, the management officer of each candidate filled out a Skills Assessment Form that summarized the candidate's skills, experience, and other pertinent job-related information.

Lamb, along with 27% of the officers formerly working within the Northeast Division, was denied a position in the new, streamlined unit. Although Lamb claimed that similarly situated white employees were "chosen over her despite the fact that she had pristine qualifications," Lamb could not adduce any evidence that Citibank's assessments of the white employees' qualifications were inaccurate, let alone racially motivated. Her past performance in the branch or regional marketing levels was not directly relevant to her potential performance in the new FOCUS group. She received only a "good" ranking, and there was a serious gap in her knowledge of the securities business, which was necessary to market the FOCUS product. For example, Citibank submitted Lamb's sworn testimony in which she admitted that she *did not know* the difference between a stock and a bond. Lamb also admitted that she lacked "classical marketing skills" and that her greatest strength was in branch-related marketing as opposed to divisional marketing. Further,

two white employees with comparable, if not superior records, also failed to gain employment in the new group.

Citibank arranged three interviews for Lamb for other positions within the Bank; none resulted in her being placed in a new job at Citibank. Citibank also arranged interviews for other terminated employees, and successfully placed another African-American officer who had been displaced by the reorganization into another position at the Bank.[4] After Lamb was unable to secure another position within Citibank, she resigned on August 25, 1988, and received full salary through March 7, 1989.

OPINIONS BELOW

The District Court accepted Lamb's allegations and recitation of facts as true. Applying the three step analysis outlined in *Burdine*, the District Court first determined that Lamb "has barely met the minimum requirements" for establishing a *prima facie* case. (District Court Opinion, Pet. 18) The District Court then observed that:

> Defendant has offered legitimate, nondiscriminatory reasons for its actions: a

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[4] With respect to Lamb's assertion that the fact that Anne Marie Fiesel ("Fiesel") — a Caucasian employee with a comparable and arguably superior record whose position had also been eliminated — located another Citibank position is evidence of discrimination, Citibank submitted Fiesel's Skills Assessment Form, in which Fiesel's ratings were higher than those received by Lamb in all Generic Skills Categories, with the exception of "interpersonal" skills, for which both were rated identically. Lamb did not — and could not — raise a genuine issue of material fact with respect to Fiesel's finding a new position, as Lamb admitted that she did not know what positions Fiesel interviewed for, how many interviews Fiesel had or what efforts Fiesel undertook to find another position within the Bank.

> general reorganization and reduction in the size of the Affluent Marketing Group, and the hiring of officers with better qualifications for the job. Citibank proffers that the white officers brought into the new group had higher performance ratings than plaintiff, higher skill ratings, and longer service in Divisional Marketing. (District Court Opinion, Pet. 19)

Quoting *Burdine*, the District Court stated:

> Plaintiff may satisfy the burden of proving that defendant's stated reasons were merely pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing the employer's proffered explanation is unworthy of credence." (District Court Opinion, Pet. 19).

After correctly setting forth the *Burdine* three-step analysis, and reviewing all the evidence in a light most favorable to the plaintiff, the District Court concluded that Lamb "*neither* establishe[d] that Citibank's proffered reasons were false *nor* that she failed to receive a position because of racial discrimination". (District Court Opinion, Pet. 20) (emphasis supplied) The District Court further noted:

> Plaintiff is unable to adduce any evidence that Citibank's assessments of the white employees' qualifications were inaccurate, let alone racially motivated, and her own "good" ranking and the serious gap in her knowledge of the securities business leaves her claim of "pristine qualifications" without support in the record. (Pet. 20-21)

Thus, the District Court, after referencing *Burdine* for the relevant legal standard (Pet. 19-20), found, as quoted above, that Lamb did not establish that Citibank's proffered reasons were false or that she failed to receive a position because of racial discrimination. It therefore granted summary judgment and dismissed Lamb's Title VII claim.

The Court of Appeals unanimously affirmed the District Court's order in a three sentence opinion, stating in relevant part:

> After examining the record, we conclude that although plaintiff established a *prima facie* case of discrimination, she failed to offer any evidence that Citibank's proffered non-discriminatory reason for her termination was pretextual. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981) (Pet. 12).

The Court of Appeals did not cite or rely upon *Hicks* in support of its opinion.

ARGUMENT
REASONS WHY REVIEW IS NOT WARRANTED

I. Summary Judgment Was Appropriate Because Lamb Failed To Offer *Any* Evidence That Citibank's Reasons Were Pretextual.

This case involves nothing more than the lower courts' evaluation of the record evidence (*i.e.*, the undisputed facts) in light of well-established law. Both courts below found that Lamb did not present any evidence whatsoever — let alone raise a genuine issue of material fact — that Citibank's reasons for her termination (through job elimination or subsequent failure to be rehired) were false. (Pet. 12, 20-22) In so finding, the lower

courts found that the so-called "evidence" that Lamb presented consisted of her own unsubstantiated opinions of her "superior qualifications" and similar inadmissible speculation. (Pet. 20-22) Simply stated, the Court of Appeals' three sentence decision affirming summary judgment presents no issue that warrants certiorari.

As applicable here — and properly applied by the Court of Appeals and the District Court — the standard for summary judgment in employment discrimination cases is well-settled. Under this Court's decisions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981) and their progeny, the plaintiff must establish a *prima facie* case of discrimination. The defendant is then required to offer a legitimate, non-discriminatory reason for its actions.

The employer must prevail if the plaintiff fails to offer any evidence that the proffered reasons are pretextual. *See, e.g., McDonnell Douglas*, 411 U.S. at 807 (if the plaintiff fails to show that the employer's reasons are pretextual, the challenged employment action "must stand"). Consistent with this Court's opinions in *McDonnell Douglas* and *Burdine*, all twelve Courts of Appeals uniformly affirm summary judgment for the employer where the plaintiff has failed to offer evidence of pretext.[5]

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[5] *See, e.g., Smith v. Stratus Computer*, 40 F.3d 11, 14 (1st Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1958 (1995) (affirming summary judgment where plaintiff "failed to adduce sufficient evidence to support a jury finding that [her employer's] stated reason for dismissing her was a pretext for discrimination"); *Bovers v. Flying Tiger Line Inc.*, 979 F.2d 291, 297 (2d Cir. 1992) (affirming summary judgment where "plaintiffs had made no significant showing that the age-neutral bases asserted by defendants were a pretext for discrimination"); *Ezold v. Wolf, Block, Shorr and Solis-Cohen*, 983 F.2d 509, 547 (3d Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. 88 (1993) (ordering summary judgment where plaintiff failed to show that employer's proffered reason (continued...)

In this case, the Court of Appeals reviewed plaintiff's evidence and agreed with the District Court that Lamb "failed

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[5](...continued)

for failing to promote her was pretextual); *Hughes v. Bedsole*, 48 F.3d 1376, 1385 (4th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 190 (1995) (affirming summary judgment where plaintiff "has failed to identify any jury issue as to whether [her employer's] proffered nondiscriminatory reasons for [her] termination were pretext"); *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 817 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 467 (1993) (affirming summary judgment where plaintiff "total[ly] fail[ed] to produce any evidence of pretext"); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 805 (6th Cir. 1994) (affirming summary judgment where plaintiff "has provided no evidence which could show, directly or indirectly, that [his employer's] explanation for [his] demotion was a pretext for discrimination"); *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1260 (7th Cir. 1993), *cert. denied*, ___ U.S. ____, 114 S. Ct. 1372 (1994) (affirming summary judgment where plaintiff had failed "to produce sufficient evidence from which a jury could find that the hospital's stated reason for discharging her . . . was a pretext for discrimination"); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 780 (8th Cir. 1995) (affirming summary judgment where plaintiff "failed to demonstrate a genuine issue of material fact as to whether [his employer's] explanation for his termination, i.e., the RIF and [his] low relative assessment score, was a pretext for age discrimination"); *Mundy v. Household Finance Corp.*, 885 F.2d 542, 546 (9th Cir. 1989) (affirming summary judgment where the "circumstances of termination alleged by [plaintiff] fail to raise any genuine issue of pretext"); *Hiatt v. Union Pac. R.R.*, 65 F.3d 838, 843 (10th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 917 (1996) (affirming summary judgment where plaintiffs "failed to offer any evidence that would permit a rational trier of fact to conclude that the defendants' actions were a pretext for intentional and unlawful discrimination"); *Edwards v. Wallace Community College*, 49 F.3d 1517, 1521 (11th Cir. 1995) (affirming summary judgment where plaintiff "has not presented any evidence that the filling of the vacancy by a minority was pretextual"); *Karpinski v. Billington*, No. 93-5269, 1994 U.S. App. LEXIS 9961, *2 (D.C. Cir. Jan. 27, 1994) ("The district court was . . . correct in granting summary judgment on the sex discrimination claim, as the record is devoid of facts to support appellant's contention that the legitimate, non-discriminatory reasons offered for her non-selection were pretextual.").

to offer *any* evidence that Citibank's proffered non-discriminatory reason for her termination was pretextual." (Pet. 12) (emphasis supplied) Lamb acknowledges that she is "not asking this Court to rule on the evidence" (Pet. 8), and concedes that the Court of Appeal's findings must be accepted. As the lower courts found — correctly — that Lamb failed to offer any evidence of pretext, her complaint was properly dismissed, and there is no issue that warrants certiorari.

II. Resolution Of Lamb's Purported "Legal Issue" Is Immaterial To This Case.

Apparently recognizing that the Court of Appeals' decision does not present an issue justifying certiorari, Lamb proposes that this Court review an issue that the Court of Appeals properly did not need to reach, and did not reach, in affirming summary judgment. Lamb asserts — without any support in the decisions below — that the issue before this Court somehow should be:

> In a Title VII employment discrimination case based on race, does the standard of proof on a motion for summary judgment, as explained in *Saint Mary's Honor Ctr. v. Hicks*, require plaintiff to establish the pretextual nature of defendant employer's non-discriminatory explanation by requiring that plaintiff prove both the falsity of the explanation and defendant's discriminatory intent? (Pet. i)

In its one paragraph decision, the Court of Appeals did not, however, cite or rely upon this Court's decision in *Hicks*. To the contrary, it relied expressly and exclusively on *Burdine*. Further, based upon the Court of Appeals' opinion, *Hicks* is not applicable.

In *Hicks*, this Court recently addressed whether, in a suit against an employer alleging intentional racial discrimination, a factfinder's rejection of the employer's proffered reasons for its action mandates a finding for the employee, or whether the plaintiff must also show that discrimination was the real reason for the action. *Hicks*, 509 U.S. at n.4. The issue as presented and decided in *Hicks* therefore arises only after the plaintiff has demonstrated that the employer's proffered reasons are false.

As both lower courts found here, Lamb failed to offer *any* evidence that Citibank's proffered reasons were false, and therefore did not implicate in any manner whatsoever the issue presented in *Hicks (i.e.*, whether pretext or "pretext plus" is the plaintiff's requisite showing). Lamb's petition therefore should be denied, as a so-called "clarification" of this Court's decision in *Hicks* would have no impact upon the decisions below.

Lamb "seeks to invoke the jurisdiction of this Court . . . on the grounds [sic] that the Court of Appeals, in affirming the decision of the District Court, decided a federal question of law in a way that conflicts with applicable decisions of this Court." (Pet. 1) Lamb's statement is simply erroneous because both the District Court and the Court of Appeals applied *Burdine* consistent with the decisions of this Court and *all* twelve Courts of Appeals. Further, as set forth above, the Court of Appeals' decision did not reach the issue addressed in *Hicks*, nor did it rely upon *Hicks*, and therefore cannot conflict with it. Even if *Hicks* were relevant, however, Lamb does not — and cannot — point to any divergence between the lower courts' decisions and this Court's decision in *Hicks*.

Lamb notes that "the District Court relied on language from this Court's decision" in *Hicks*. (Pet. 6) While quoting *Hicks* (along with *McDonnell Douglas* and *Burdine*) in its discussion of the applicable legal standard, the District Court did not have to, and did not, reach the pretext issue presented in *Hicks* as Lamb failed to present any pretext evidence

whatsoever. Even assuming — as Lamb suggests — that *Hicks* requires that plaintiff need show only that the proffered reason is false, summary judgment was appropriate because the District Court held that Lamb failed to meet even this standard. (Pet. 20) (Lamb "*neither* establishes that Citibank's proffered reasons were false *nor* that she that she failed to receive a position because of racial discrimination") (emphasis supplied). Thus, Lamb has not presented any ground to justify this Court's review of *Hicks*.

CONCLUSION

Based on the foregoing, the Court should deny Lamb's Petition for Writ of Certiorari.

Respectfully submitted,

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